The Aspinall Curzon Ltd v Khoo Teng Hock

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO R8-24-102 OF 1989
EUSOFF CHIN J
18 FEBRUARY 1991

Contract — Consideration — Illegal consideration — Against public policy — Gambling debt — Whether consideration was illegal — Contracts Act 1950, ss 24 & 31 — Common Gaming Houses Act 1953, s 27A

Civil Procedure — Registration of foreign judgment — Judgment for gambling debt obtained in the United Kingdom — Whether against public policy to enforce judgment locally — Reciprocal Enforcement of Judgments Act 1958, ss 4 & 5

The plaintiff, a licensed gambling casino, obtained in the High Court of England a judgment against the defendant and subsequently applied to the High Court in Kuala Lumpur to have the judgment registered under s 4 of the Reciprocal Enforcement of Judgments Act 1958. The application was granted by the senior assistant registrar and the defendant's application to set aside the order was dismissed. The defendant appealed to the judge-in-chambers. On appeal, the defendant argued that the cheques given to the plaintiff (in exchange for cash and gaming chips) were given for illegal consideration, or alternatively that the judgment was for gambling debt, and should not be enforced, being against public policy.

Held, dismissing the defendant's appeal:

(1) Had the contract been entered in this country it had been so executed with lawful consideration, and s 24 of the Contracts Act 1950 cannot apply to make it void.

(2) The cheques were issued in exchange for cash and gaming chips for purposes of gaming at a licensed gaming casino. It is not for an unlawful purpose by the law of England. Had such transaction occurred in this country, it is a lawful transaction provided that the gaming is done in a gaming premises licensed by the Finance Minister under s 27A of the Common Gaming House Act 1953. The enforcement of the UK judgment cannot be considered as against the public policy of Malaysia.

[Bahasa Malaysia summary

Plaintif, sebuah kasino judi yang berlesen, memperolehi dalam Mahkamah Tinggi, England suatu penghakiman terhadap defendan dan kemudiannya memohon kepada Mahkamah Tinggi di Kuala Lumpur untuk penghakiman itu didaftarkan di bawah s 4 Akta Penguatkuasaan Penghakiman Bersaling 1958. Permohonan itu telah dibenarkan oleh penolong kanan pendaftar dan permohonan defendan bagi mengenepikan perintah itu telah ditolak. Defendan merayu kepada hakim dalam kamar. Dalam rayuannya, defendan berhujah bahawa cek-cek yang diberi kepada plaintif (sebagai pertukaran untuk wang tunai dan 'chips' judi) adalah diberi untuk balasan yang menyalahi undang-undang, atau sebagai alternatif, bahawa penghakiman itu adalah untuk hutang judi dan tidak patut dikuatkuasakan kerana melanggar polisi awam.

Diputuskan, menolak rayuan defendan:

(1) Sekiranya kontrak itu dibuat dalam negara ini, ia adalah dilaksanakan dengan balasan yang sah dan s 24 Akta Kontrak 1950 tidak boleh dipakai untuk menjadikannya batal dan tak sah.

(2) Cek-cek itu telah dikeluarkan sebagai pertukaran untuk wang tunai dan 'chips' judi di sebuah kasino judi berlesen. Ia bukanlah untuk tujuan yang salah di sisi undang-undang menurut undang-undang England. Jika transaksi tersebut berlaku dalam negara ini, ia juga adalah suatu transaksi yang sah dengan syarat perjudian dibuat dalam premis judi yang dilesenkan oleh Menteri Kewangan di bawah s 27A Akta Rumah Perjudian Terbuka 1953. Penguatkuasaan penghakiman UK tersebut tidaklah boleh dinggap sebagai melanggar polisi awam Malaysia.]

Cases referred to

1 *Saxby* v *Fulton* [1909] 2 KB 208 (folld)
2 *Richardson* v *Mellish* (1824) 2 Bing 229; 130 ER 294 (refd)
3 *Naylor, Benzon & Co Ltd* v *Krainische Industrie Geselleschaft* [1918] 1 KB 331 (refd)
4 *Egerton* v *Brownlow (Earl)* (1853) 4 HL Cas 1 (refd)

Legislation referred to

Civil Law Act 1956 s 26
Common Gaming Houses Act 1953 s 27A
Contracts Act 1950 ss 24, 31
Reciprocal Enforcement of Judgments Act 1958 (Rev 1972) ss 4, 5

SK Sivam for the appellant.
Chan Kah Hong for the respondent.

Cur Adv Vult

Eusoff Chin J: On 8 March 1989, the plaintiff, a licensed gambling casino, obtained in the High Court of England a judgment against the defendant in the sum of £512,136.48, and costs of £196 which respectively in Malaysian ringgit, as on 8 March 1989, came to $2,428,807.26 and $929.53.

The plaintiff applied to the High Court in Kuala Lumpur to have the judgment registered under s 4 of the Reciprocal Enforcement of Judgments Act 1958 (Rev 1972). On 21 November 1989 the learned senior assistant registrar of the High Court granted the application.

The defendant's application to set aside the learned senior assistant registrar's order was dismissed on 8 March 1990. The defendant appealed to the judge-in-chambers.

The defendant in his affidavit said that the money owed was what he had lost at the gaming tables and had issued cheques to the plaintiff. This was denied by the plaintiff. The plaintiff said that a person had to use gaming chips to gamble in its premises. The procedure was that a person intending to gamble at the plaintiff's premises had to purchase chips from the plaintiff's employees. It is not the case that a person would be given gaming chips to engage in any gaming, and that if he lost, he would issue cheques for the amount lost. In this case the defendant had gone to the plaintiff's licensed gaming premises to gamble. He had issued cheques to one of the plaintiff's employees to obtain cash and gaming chips up to the amount of the cheques.

He had then stopped payment on the cheques. The defendant had then settled part of his debts to the plaintiff. The plaintiff sued the defendant in the English court, and obtained the judgment.

Before me, SK Sivam for the defendant argued that the cheques were given for illegal consideration, or alternatively, that the judgment was for gambling debt, and should not be enforced as it is against the public policy of this country, and that the contract was in contravention of some essential principles of justice or morality. Sections 24 and 31 of the Contracts Act 1950, s 26 of the Civil Law Act 1956, and s 5 of the Reciprocal Enforcement of Judgments Act 1958 were cited.

Section 24 of the Contracts Act 1950 states:

> The consideration or object of an agreement is lawful, unless —
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> (a) it is forbidden by a law;
> (b) it is of such a nature that, if permitted, it would defeat any law;
> (c) it is fraudulent;
> (d) it involves or implies injury to the person or property or another; or
> (e) the court regards it as immoral, or opposed to public policy.
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> In each of the above cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

Section 31 of the Contracts Act 1950 states:

> (1) Agreements by way of wager are void; and no suit shall be brought for recovering anything alleged to be won on any wager, or entrusted to any person to abide the result of any game or other uncertain event on which any wager is made.
> (2) This section shall not be deemed to render unlawful a subscription or contribution, or agreement to subscribe or contribute, made or entered into for or toward any plate, prize, or sum of money, of the value or amount of five hundred dollars or upwards, to be awarded to the winner or winners of any horse-race.
> (3) Nothing in this section shall be deemed to legalise any transaction connected with horse-racing forbidden by any written law.

Section 26 of the Civil Law Act 1956 states:

> Agreement by way of gaming or wagering to be null and void.
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> (1) All contracts or agreements whether by parol or in writing by way of gaming or wagering shall be null and void.
> (2) No action shall be brought or maintained in any Court for recovering any sum of money or valuable thing alleged to be won upon any wager or which has been deposited in the hands of any person to abide the event on which any wager has been made.
> (3) Subsections (1) and (2) shall not be deemed to apply to any subscription or contributions, or agreement to subscribe or contribute, for or toward any plate, prize, or sum of money to be awarded to the winner or winners of any lawful game, sport pastime or exercise.
> (4) Any promise, express or implied, to pay any person any sum of money paid by him under or in respect of any contract or agreement rendered null and void by subsections (1) and (2) or to pay any sum of money by way of commission, fee reward or otherwise in respect of any such contract or of any service in relation thereto or in connection therewith, shall be null and void, and no action shall be brought or maintained to recover any such sum of money.

Section 5 of the Reciprocal Enforcement of Judgments Act 1958 states:

> (1) On any application in that belief duly made by any party against whom a registered judgment may be enforced, the registration of the judgment —
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> (a) shall be set aside if the registering court is satisfied —
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> (i) that the judgement is not a judgement to which this Part applies or was registered in contravention of this Act;
> (ii) that the courts of the country of the original court had no jurisdiction in the circumstances of the case;
> (iii) that the judgement debtor, being the defendant in the proceedings in the original court, did not (notwithstanding that process may have been duly served on him in accordance with the law of the country of the original court) receive notice of those proceedings in sufficient time to enable him to defend the proceedings and did not appear.
> (iv) that the judgement was obtained by fraud;
> (v) that the enforcement of the judgment would be contrary to public policy in Malaysia; or
> (vi) that the rights under the judgement are not vested in the person by whom the application for registration was made; and
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> (b) may be set aside if the registering court is satisfied that the matter in dispute in the proceedings in the original court had previously to the date of the judgement in the original court been the subject of a final and conclusive judgement by a court having jurisdiction in the matter.

KH Chan for the plaintiff argued that even if the judgment was for a gambling debt, the gambling took place in The Aspinall Curzon which was a gambling casino licensed under the Gaming Act 1968 [UK]. In Malaysia too, the Finance Minister under s 27A of the Common Gaming Houses Act 1953 may by licence authorize the promotion and organization of gaming by a local company. A number of companies have been issued such licences in Malaysia. Section 27A of the Common Gaming Houses Act 1953 states:

> (1) Notwithstanding this Act or the Betting Act, 1953 or any other law relating to gaming, betting or lotteries, the Minister of Finance may, in his discretion, by licence authorise a company registered under the Companies Act, 1965, other than a foreign company as defined in subsection (1) of section 4 of the Act, to promote and organise gaming —
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> (a) in respect of such game or games;
> (b) on such premises;

(c) subject to the payment of such fees and duties;
(d) subject to such other terms and conditions;

I agree with KH Chan that, had the contract been entered in this country it had been so executed with lawful consideration, and s 24 of the Contracts Act 1950 cannot apply to make it void.

The provisions of s 31 of the Contracts Act 1950 and s 26 of the Civil Law Act 1956 are not meant to apply to gaming or wagering in any premises run by a company licensed by the Finance Minister under s 27A of the Common Gaming Houses Act 1953.

In *Saxby* v *Fulton*,[1] the issue was whether money lent for the purpose of gaming was recoverable in England although the loan was made in a foreign country (France) where gaming was not illegal by the law of that country. The Court of Appeal held that the contract being legal in the law of the country where it was made, it was enforceable in the English courts unless its enforcement would be contrary to public policy, public morality or natural justice.

The argument of the defendant's learned counsel is that the enforcement of this foreign judgment is against public policy. But what is public policy? In *Richardson* v *Mellish*,[2] Burrough J protested against arguing too much upon public policy. It is a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from the sound law. It is never argued at all but only when other points fail.

In *Naylor, Benzon & Co Ltd* v *Krainische Industrie Gesellschaft*,[3] McCardie J at p 342 stated:

> But the courts have not hesitated in the past to apply the doctrine whenever the facts demanded its application. In *Janson* v *Driefontein Consolidated Mines* [1902] AC 484, Lord Halsbury LC said: 'I deny that any court can invent a new head of public policy.' I very respectfully doubt if this dictum be consistent with the history of our law or with many modern decisions. In *Wilson* v *Carnley* [1908] 1 KB 729 the Court of Appeal held that a promise of marriage made by a man who to the knowledge of the promisee was at the time of making the promise married is void as being against public policy. This decision marked a new application or head of public policy. In *Neville* v *Dominion of Canada News Co* [1915] 3 KB 556 the Court of Appeal held, affirming Atkin J, that an agreement by a journalist not to comment upon the plaintiff's company or its directors or business was void as against public policy. This decision created, I think, a wholly new head of public policy. In *Horwood* v *Millar's Timber and Trading Co* [1917] 1 KB 305 the Court of Appeal held that an agreement which unduly fettered a man's liberty of action and the free disposal of his property was void as against public policy. This decision also, I think, created in substance a new head of public policy. The truth of the matter seems to be that public policy is a variable thing. It must fluctuate with the circumstances of the time.

In *Egerton* v *Brownlow (Earl)*,[4] Lord Truro, at p 196 stated:

> Exceptions have been made to the expression of 'public policy', and it has been confounded with what may be called political policy; such as whether it is politically wise to have a sinking fund or a paper circulation, or the degree and nature of interference with foreign states; with all which, as applied to the present subject, it has nothing whatever to do. Public policy, in relation to this question, is that principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against the public good, which may be termed, as it sometimes has been, the policy of the law, or public policy in relation to the administration of the law.

In the case before me, the cheques were issued in exchange for cash and gaming chips for purposes of gaming at a licensed gaming casino. It is not for an unlawful purpose by the law of England. On the facts of the case, had such transaction occurred in this country, it is a lawful transaction provided that the gaming is done in gaming premises licensed by the Finance Minister under s 27A of the Common Gaming Houses Act 1953. The enforcement of the UK judgment cannot be considered as against the public policy of this country.

I therefore confirm the senior assistant registrar's order, and dismiss this appeal with costs.

Appeal dismissed.

Solicitors: *PG Lim & Co*; *Khaw & Hussein.*

Reported by *Zarinah Marican*